No. 588

In the Supreme Court of the United States

OCTOBER TERM, 1941

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ELECTRIC VACUUM CLEANER COMPANY, INC.; INTERNATIONAL MOLDERS' UNION OF NORTH AMERICA, LOCAL 430; PATTERN MAKERS' ASSOCIATION OF CLEVELAND AND VICINITY; INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 54; METAL POLISHERS' INTERNATIONAL UNION, LOCAL NO. 3; AND FEDERAL LABOR UNION NO. 18,907

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

INDEX

440273—42——1

CITATIONS

Cases: Page

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 588

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ELECTRIC VACUUM CLEANER COMPANY, INC.; INTERNATIONAL MOLDERS' UNION OF NORTH AMERICA, LOCAL 430; PATTERN MAKERS' ASSOCIATION OF CLEVELAND AND VICINITY; INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 54; METAL POLISHERS' INTERNATIONAL UNION, LOCAL NO. 3; AND FEDERAL LABOR UNION NO. 18,907

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 867–875) is reported in 120 F. (2d) 611. The findings of fact, conclusions of law, and order of the Board (R. 150–217) are reported in 18 N. L. R. B. 591.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 6, 1941 (R. 866). The petition for a writ of certiorari was filed on September 6, 1941, and was granted on October 20, 1941. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

The Board found that the Company in 1935 and 1936 made one year written agreements with a labor union, accompanied by oral and undisclosed agreements that employees subsequently hired would be required to join that union. The Company in 1937, shortly prior to the expiration of the 1936 agreements, sought by coercive and discriminatory acts to force employees not covered by the oral agreement to join or adhere to the union and to prevent them from joining a rival union. After locking out its employees to aid the first union, the Company reopened under a full closed-shop contract with it, and pursuant thereto refused to reinstate certain employees. The questions are:

1. Whether the Board's foregoing findings of fact were supported by substantial evidence.

2. Whether coercion of old employees not covered by the oral agreements was lawful (a) because new employees were required by the oral agree-

ments to become members of the contracting union, or (b) because the coercion was requested by the contracting union.

3. Whether the full closed-shop contract of 1937 was invalid because of the prior assistance despite absence of a showing that the assistance caused a majority of the employees to join or adhere to the assisted union.

4. Whether the old employees who were members of the contracting union at the time of the 1935 and 1936 collective agreements were required to retain their membership during the life of the collective agreements under penalty of discharge.

5. Whether, if the full closed-shop contract of 1937 was invalid, the discharges of new employees covered by the oral agreements of 1935 and 1936 were nevertheless lawful. The discharges would be lawful only if both of the following questions were answered in the affirmative:

(a) Whether the Board's finding that the oral agreements were abandoned prior to the discharges is unsupported by substantial evidence; and

(b) Whether employees may be discharged for failure to comply with a compulsory membership requirement in a collective agreement not disclosed to them.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon proceedings pursuant to Section 10 of the National Labor Relations Act, in which five unions affiliated with the American Federation of Labor (hereafter called the Affiliates)[1] received notice and were permitted to intervene (R. 153), the Board on December 21, 1939, issued its findings of fact, conclusions of law, and order (R. 150–217).[2] The Board's evidentiary findings together with the supporting evidence are set forth in the Argument. The bare outline of the findings is as follows:

On June 22, 1935, the Electric Vacuum Cleaner Company (hereafter called the Company) and the

---

[1] International Molders' Union of North America, Local 430; Pattern Makers' Association of Cleveland and Vicinity; International Association of Machinists, District No. 54; Metal Polishers' International Union, Local No. 3; and Federal Labor Union No. 18,907.

[2] After the hearing, the Board transferred the proceedings to itself and no trial examiner's report was issued (R. 47). On July 7, 1938, the Board issued findings of fact, conclusions of law, and an order (R. 48–70). On April 11, 1939, after due notice to the parties (R. 80–81) and without objection by them (R. 88), the Board vacated and set aside these findings of fact, conclusions of law, and order (R. 82), and on June 21, 1939, issued an order directing issuance of proposed findings of fact, proposed conclusions of law, and a proposed order (R. 83). On ~~July 7, 1938~~, these were issued by the Board (R. 84–137). After exceptions and briefs were filed by the Company and the Affiliates and oral argument held (R. 137–149, 155), the Board on December 21, 1939, entered the findings of fact, conclusions of law, and order now before the Court (R. 150–217).

Affiliates, representing a majority of the Company's employees, entered into a one-year written collective bargaining agreement (R. 160). As a supplement to the written contract, the Company orally agreed that all new employees, i. e., those hired after the date of the contract,[1] should be required to join the appropriate A. F. of L. affiliate (R. 160, 161–164, 178, 197). This oral agreement was not revealed to the employees (R. 161, 162, 164–166). On July 6, 1936, when the Affiliates represented an increased majority of the employees, the written and oral agreements were extended to June 23, 1937, but again the employees were not informed of the oral agreement (R. 161, 177–178, 185, 197). During March 1937, a group of employees began to organize a local of the United Electrical and Radio Workers of America (hereafter called the United), affiliated with the C. I. O. (R. 168–169, 170, 180, 188–189). The Company thereupon attempted to forestall the organization of its plant by the United and by unfair labor practices assisted the Affiliates. It compelled a number of old employees to join or retain membership in the Affiliates under penalty of discharge; it discharged an old employee because of his refusal to join the Affiliates; it locked out

[1] We refer, as does the Board's decision, to those in the Company's employ on June 22, 1935, when the contract was entered into, as "old" employees, and to the persons hired thereafter as "new" employees.

all its employees for two weeks to enable the Affiliates to cement their ranks and prevent defections to the United; and it informed its employees that under the July 1936 agreements all employees were required to be members of the Affiliates, which was not true (R. 166–189, 192–193). Before reopening the plant, the Company and the Affiliates abandoned the July 1936 agreements and on April 3, 1937, entered into an oral full closed-shop contract, which was subsequently reduced to writing, requiring membership in the Affiliates as a condition of employment (R. 189–194, 196, 199, 206). In conformance with the new closed-shop contract, the Company denied employment to 24 employees who had failed to obtain approval of, or to join, the Affiliates (R. 190–191, 196–200, 204).

The Board found that by these actions the Company interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, thereby violating Section 8 (1); that because of the antecedent assistance rendered to the Affiliates, the 1937 closed-shop contract was illegal under the proviso to Section 8 (3) of the Act; and that the refusal to reemploy the 24 employees in accordance with the closed-shop contract was therefore discriminatory and in violation of Section 8 (1) and (3) of the Act (R. 177–179, 187–188, 194–196, 197–200, 202, 206–207, 208, 211).

The Board's order required the Company (1) to cease and desist from its unfair labor practices,

from giving effect to the closed-shop provision of its contract with the Affiliates, and from giving effect to any provision of that contract should the Board certify another labor organization as exclusive bargaining representative; (2) to offer reinstatement with back pay to the employees discriminated against; and (3) to post notices (R. 211–217).

Thereafter the Board petitioned the court below for enforcement of its order (R. 1–9).[4] On June 6, 1941, the court handed down its opinion and entered a decree setting aside the order (R. 866–875).[5] On October 20, 1941, this Court granted the petition for a writ of certiorari.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that an employer who has entered into a collective contract containing closed-shop provisions applicable to only some employees may assist the contracting union by coercion of other employees.

2. In failing to hold that the Company by coercing old employees assisted the contracting union by unfair labor practices.

---

[4] A motion of the Affiliates to intervene before the court was granted (R. 866).

[5] The back-pay provisions of the Board's order provided also for reimbursement of government relief agencies. The Board does not request reversal of the decree insofar as it denies enforcement of that portion of the order. *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7.

3. In holding that the full closed-shop contract thereafter made with the assisted union was valid.

4. In holding that members of an exclusive bargaining representative are obligated, under penalty of discharge, to retain membership, although the collective agreement with the employer contains no provision requiring retention of membership.

5. In holding that notice of an unrevealed oral closed-shop agreement can be imputed to employees covered by it so as to justify discharge of employees who fail to comply with its terms.

6. In failing to sustain the Board's finding that the Company discriminated against 24 employees in violation of Section 8 (3) and (1).

7. In refusing to enforce the Board's order in full, except for the work-relief provisions.

SUMMARY OF ARGUMENT

A. The Company and the Affiliates entered into a written collective-bargaining agreement, accompanied by an oral agreement requiring new employees to become members of the Affiliates, but not requiring old employees either to become or remain members of the Affiliates. The oral agreement was not disclosed to the employees. Shortly before the expiration date of the agreements a group of employees undertook the organization of a local of the United. The Company thereupon took action to compel all employees, old and new, to become members of the Affiliates and to forego

the United. Among other measures the Company resorted to threats of discharge, discharge, and lock-out. Thereafter, the Company and the Affiliates entered into a full closed-shop agreement requiring all employees, old and new, to become members of the Affiliates, and pursuant to that contract refused to reinstate 24 employees.

B. Because of the assistance which the Company had rendered to the Affiliates the full closed-shop contract was invalid. Section 8 (3). There is no merit in the Affiliates' contention that the assistance was proper because rendered at the request of the existing collective-bargaining representative. Both the Act and its legislative history preclude that view. Equally invalid is the holding of the court below that because the oral agreement required new employees to become members of the Affiliates, the Company was free to impose compulsory membership requirements on old employees. The court's theory that a contract which *pro tanto,* i. e. with respect to the new employees, falls within the proviso of Section 8 (3) confers a license on an employer to coerce other employees in order to avoid inter-union rivalry is without basis.

Nor is there merit in the contention advanced by the Affiliates that a closed-shop contract is valid despite employer assistance in the absence of a showing that such assistance caused the adherence of a majority of the employees. The language of

the proviso of Section 8 (3) clearly prohibits closed-shop contracts with unions assisted by any unfair labor practices; there is no requirement that the assistance must effect a majority. On the contrary the proviso plainly imposes two separate prerequisites to the validity of a closed-shop agreement: (1) that the contracting union be the majority representative; and (2) that the organization be unassisted by unfair labor practices. See S. Rep. No. 573, 74th Cong., 1st Sess., p. 12.

C. Since the full closed-shop contract was invalid, the Company's refusal to reinstate 24 employees pursuant to the contract was discriminatory in violation of Section 8 (3) and (1) of the Act. The holding of the court below that the discharge of certain of the old employees was independently justified because they had violated the original collective agreement by failing to maintain their membership in the Affiliates is clearly unsound. Since the collective agreement imposed no membership requirement on old employees, the court's holding could not have been bottomed on any express term of the collective agreement. Nor can the holding that an undertaking to maintain membership is inherent in every collective agreement be sustained. To adopt a rule implying that every collective agreement includes a subsidiary agreement by the members of the contracting union to maintain their membership in that union would gravely limit the em-

ployees' freedom to choose their representatives, guaranteed by the Act.

The refusal to reinstate the new employees was also discriminatory. The refusal cannot be justified on the basis of the earlier oral agreement for two reasons: (1) the Board found upon substantial evidence that the oral agreement had been abandoned by the parties when the full closed-shop contract was made; and (2) even had the oral agreement not been abandoned, the Company's failure to inform the employees of its existence deprived the Company of the right to discharge employees for failure to comply with its terms.

ARGUMENT

THE COURT BELOW ERRED IN SETTING ASIDE THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8 (1) AND (3) OF THE ACT

A. THE BOARD'S FINDINGS OF FACT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

Concerning the presence of substantial evidence to support most of the Board's findings of fact there is no dispute.[9] While the court below con-

[9] See the Statements in the Company's (pp. 2–5) and the Affiliates' (pp. 2–5) briefs in opposition to the petition for certiorari. The respondents do, however, question the sufficiency of the evidence to support the Board's findings that (1) the employees had received no notice of the oral agreements of 1935 and 1936; and (2) the oral agreements of 1935 and 1936 did not restrict the old employees in their choice of unions. These issues we discuss below, pp. 13–16.

cluded that the Company had not violated the Act, its decision was not based on a holding that supporting evidence was lacking (R. 867–875). In these circumstances, we shall limit ourselves to a brief recital of the facts as found by the Board and as shown by the supporting evidence. Cf. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518.[1]

The execution of collective agreements of June 22, 1935, and July 6, 1936.—On June 22, 1935, after negotiations, the Company entered into a written contract for one year with the Affiliates, granting exclusive recognition to the Affiliates and covering the terms and conditions of employment (R. 160; R. 237–238, 259, 748–749, 810–811, 845–848). Before signing the contract the Company was presented with membership cards in the Affiliates signed by 608 out of a total of 799 employees (R. 160; R. 253, 259, 291, 748, 809–810, 865). Although the Affiliates had requested a closed shop, the Company refused to accede to the request, but orally agreed with the Affiliates that all new employees, i. e., those hired after the date of the contract, should be required to join the appropriate A. F. of L. affiliate after a work-probation period of two weeks (R. 160; R. 264–265, 283–284, 544, 688, 721–722).

---

[1] In the statement which follows, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

On July 6, 1936, the written and oral agreements were renewed until June 23, 1937 (R. 161; Bd. Exh. 7, R. 238, 265, 686, 689, 741–742). The Affiliates at the time represented all but 38 of the workers (R. 161; R. 253).

Notice of the verbal agreements of June 22, 1935, and July 6, 1936; applicability to old employees.— The Board found that the supplementary oral agreements requiring new employees to join the Affiliates were not revealed to the employees (R. 161, 162, 164–166, 177–178, 185, 199).[8] Although respondents question this finding (*supra*, p. 11, n. 6), it is clearly supported by substantial evidence. The only new employee called by the Affiliates as a witness on the issue of notice testified that nothing had ever been said to him about a requirement that he join the Affiliates, and that although he had been hired in July 1935, he became a member of the Affiliates only in April 1937 (R. 795). Gordon, a business agent of one of the Affiliates, testified that in 1937 the new employees "doubted the custom" of requiring them to join the Affiliates and said they "didn't know anything about" the oral agreement (R. 753); other witnesses for the Affiliates testified only to a general "understanding" (R. 785, 803). The Board expressly rejected (R. 165–166) the testimony of

[8] The Board analysed the evidence on this issue in detail and made express subsidiary findings concerning the relevant testimony. See R. 164–166.

Paulus, the Company's plant superintendent (R. 688–689), and Wilson, the Company's vice president (R. 283–284), that the foremen had been instructed to notify new employees of the requirement and that the foremen had so notified those employees. This it was warranted in doing: the Company called no foremen or new employees to substantiate the testimony (R. 166); new and old employees called by the Board testified that new employees were not notified (R. 447–448, 471, 543–544, 666–667, 670); and, finally, Tuteur, the Company's president, expressly stated in a letter to the Board's Regional Director, written June 12, 1936, that the information Tuteur was imparting concerning the oral agreement was "in confidence" (R. 741–742). In these circumstances, the Board was warranted in its conclusion that the new employees were not notified of the oral agreement.

The Board also found that the oral agreements did not apply to the old employees at all (R. 160, 161–164, 178, 197). In their respective briefs in opposition to the petition for certiorari, however, the Company (pp. 3, 6) and the Affiliates (p. 3) contend, as they did before the Board, that the oral agreements required old employees who were members of the Affiliates to retain their membership. The Board's finding to the contrary* is amply supported. Muelhoeffer and Gordon, busi-

*The Board's analysis of the evidence on this issue and its subsidiary findings are at R. 161–164.

ness agents of one of the Affiliates, who testified to the 1935 negotiations, stated only that the oral agreement covered new employees (R. 750, 775, 811, 829). Paulus testified that there was no requirement relating to old employees (R. 688). Tuteur in his letter (*supra*, p. 14), and Wilson, in his testimony, in describing the agreements (R. 283–284) made no mention of old employees. Keehl, an old employee who had been a member of the Affiliates but who had fallen six months behind in his dues, asked Waterbury, respondent's accountant actively handling labor relations, whether he was required to belong to the Affiliates. Waterbury advised Keehl to pay his dues but said nothing about a requirement that Keehl remain a member (R. 492–493). Finally, the Board expressly rejected (R. 163–164) the Company's contention that a notice which it posted in 1935 advising the employees that they "would be considered as working against the interests of the Company and as such subject to discharge" if they "did anything to disturb the peaceful and friendly relationship" between the Company and the Affiliates (R. 291) embodied an agreement requiring the old employees to retain their membership in the Affiliates.[10] Plainly the

[10] Theodore Vitosky, an old employee, testified that he stopped paying dues to the Affiliates, yet during the entire life of the agreements and until March 1937, nothing was ever said to him about his defection (R. 302–303, 316). Mike Smith and Clyde Boyes, both old employees, testified to the same effect (R. 348–349, 512).

Board was justified in finding that this "caveat did not bring the old employees within the terms of the oral agreement" (R. 164). And equally plainly, in the complete absence of evidence in the record of a requirement that old employees who were members of the Affiliates retain their membership, the Board's conclusion on this issue was warranted.[11]

The Company's interference with the United campaign and its assistance to the Affiliates.— During March 1937, about three months prior to the termination date of the renewed contracts, a number of the Company's employees began to organize a local of the United, a C. I. O. affiliate; on March 17, about 60 employees met with a United organizer, joined the United, and the next day distributed United application cards among the other employees (R. 168–169, 170, 180; R. 379–382, 429–430, 538). During the next two weeks a large number of employees attended meetings of United. Officers were elected at a meeting on March 19, many of those attending a meeting on March 28 signified their resignation from the Affiliates, and the local was chartered by United on April 1. (R. 188–189; R. 340–341, 389-

[11] In its Proposed Findings of Fact, the Board found that the oral agreement related only to new, not old, employees (R. 94–97). The Affiliates did not except to this finding (R. 146), and at the oral argument before the Board did not question the finding (R. 161, n. 7).

391, 399–402, 438–439, 475–476, 610–611, 617, 660–662, 843, 859–860, 863–864.)

Meanwhile, beginning on March 16, the Company and the Affiliates took joint action to frustrate the United drive, and to compel all employees to join the Affiliates. On March 16, 17, and 18, Company executives including Vice-President Wilson and Plant Superintendent Paulus summoned groups of old employees and, in the presence of ranking A. F. of L. officials, directed the employees to join or reaffirm their membership in the Affiliates under penalty of discharge. A number of the men promptly signed Affiliate cards before these Company and Affiliate officials. (R. 166–178, 180; R. 305–308, 513–518, 526–529, 685, 690–691, 699, 733–734.) When Ramsey, an old employee who was not a member of the Affiliates, refused to join, the Company discharged him forthwith (R. 167, 168, 172–177; R. 268, 525–529, 533–534, 691, 699–700).[12]

In protest against Ramsey's discharge, the machine shop employees engaged in a one-day sit-down strike which was settled when the Company, with the consent of the Affiliates, agreed to reinstate Ramsey and to allow its employees "to have

[12] On March 17, the A. F. of L. officials proposed a strike to Vice-President Wilson, but Wilson assured them that a strike was unnecessary since "he was going to make them join the American Federation of Labor Union, and if they don't he would fire one or two so the rest of them will join" (R. 171–172, 179; R. 565, cf. 516, 685, 268).

the right to join any Union of their own free will" (R. 183, 173–174, 180–185; R. 267–268, 281–282, 293, 383–386, 431–438, 484, 496, 857).

When the strike ended on Friday, March 19, the employees expected to return to work as usual on the next workday, Monday, March 22 (R. 184; R. 438–439, 484, 496). The Company similarly intended to reopen on that day (R. 186; R. 279-280). On Saturday, March 20, however, the Company inserted a notice in the local newspapers announcing that, at the request of the Affiliates, the plant would be closed on Monday (R. 185–188; R. 272–273, 856). The notice was, as Vice-President Wilson testified, the result of a conference between the Company and the Affiliates at which the Affiliates had demanded the shut-down so that they "might go over the situation and get their lines in order," and thereby defeat the effort of the United to "proselyte members" among the employees (R. 186–187; R. 255–256, 273).

After a shut-down of two weeks, the plant reopened on Monday, April 5; on the preceding Saturday and Sunday, the Company had inserted notices in the local newspapers stating that under its 1936 contract it was obligated to "employ only persons affiliated with" the Affiliates, and that on resumption of operations "only those employees who are members of the crafts under contract with us will be employed" (R. 189, 192–193; R. 852). These notices misrepresented the terms of the

1936 agreement and were deliberately intended to conceal the fact that on April 3, two days before reopening, the Company and the Affiliates had abandoned the 1936 contract and orally agreed upon a full closed-shop contract applicable to old, as well as new, employees (R. 192–194, 189–191, 199, 201, 206; R. 253–255, 726, 813, 828).

The Company's discrimination pursuant to the contract of April 3, 1937.—Pursuant to the closed-shop contract of April 3, the Company refused to permit any employee to return to work who did not present a clearance card from the Affiliates (R. 190–191, 196, 197–198, 200, 204; R. 864, 252, 276–277, 332–333, 342, 353, 368, 479, 726, 813). Twenty-four members of the United, including three old employees who had never been members of the Affiliates,[13] 16 old employees who had been members of the Affiliates,[14] and five new employees,[15] were thereby discriminatorily excluded from employment (R. 190, 197–200).[16] On May 20, the oral closed-shop contract of April 3 was replaced by a similar one-year written contract requiring all employees of the Company to be members of the Affiliates (R. 196; R. 39, 41–43, 853).

---

[13] R. 455–457, 483, 373–375.

[14] R. 310, 324–325, 340, 349, 364–365, 475, 492–493, 537, 560–561, 585–586, 601–602, 610, 617, 622, 630, 635–636.

[15] R. 447–448, 462–464, 554–555, 664, 668–670.

[16] Some were refused clearance cards by the Affiliates because of their activities on behalf of the United (R. 311–312, 328–329, 350, 466–467, 541–542, 570–571, 587–588,

B. ON THESE FACTS THE BOARD PROPERLY CONCLUDED THAT COMPANY ASSISTED THE AFFILIATES BY CONDUCT WHICH TERFERED WITH, RESTRAINED, AND COERCED ITS EMPLOY CONTRARY TO SECTION 8 (1) OF THE ACT; THAT CONSEQUEN THE SUBSEQUENT CLOSED-SHOP CONTRACT WITH THE AFF ATES WAS INVALID; AND THAT THE DISCRIMINATION IN PLOYMENT PURSUANT TO THE CONTRACT VIOLATED SECTIO (3) AND (1) OF THE ACT

The foregoing facts clearly support the Boar ultimate findings (1) that commencing on Ma 16, 1937, the Company assisted the Affiliates conduct which interfered with, restrained, and erced its employees in the exercise of the rig guaranteed in Section 7 of the Act, contrary Section 8 (1) (R. 177–179, 187–188, 196, 206, 21 (2) that consequently the subsequent closed-sh contract with the Affiliates of April 3, 1937, duced to writing on May 20, 1937, was invalid u der Section 8 (3) of the Act (R. 194–196, 2 206–207); and (3) that the denials of reemplo ment to 24 employees pursuant to the closed-sh contract were discriminatory in violation of Secti 8 (3) and (1) of the Act (R. 197–200, 208, 21 We shall consider these findings *seriatim*.

605, 613, 618–619, 631–632, 637); others made persistent tempts to get clearance cards, but after being shunted fr one A. F. of L. representative to another, abandoned furth efforts (R. 341–342, 365–368, 485–487, 627–628); a few ceived clearance cards after persistent attempts, only to denied employment on the ground that their jobs had in t meanwhile been filled (R. 449–452, 458–461, 479–480, 55 557).

1. *On and after March 16, 1937, the Company assisted the Affiliates by conduct which interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, contrary to Section 8 (1)*

It is apparent from the Board's evidentiary findings, supported by the substantial evidence above cited, that beginning on March 16, 1937, the Company engaged in conduct which assisted the Affiliates and interfered with, restrained, and coerced the employees in the exercise of their rights to self-organization guaranteed by Section 7 of the Act. Among the unfair labor practices in which the Company engaged were the following:

(a) On March 16, 17, and 18, 1937, the Company through its highest officials summoned its old employees and threatened them with discharge unless they joined or reaffirmed membership in the Affiliates (*supra*, p. 17). Since the existing written and oral collective bargaining agreements of July 1936 did not require old employees to be or remain members of the Affiliates (*supra*, pp. 14–16), and since, therefore, they were entitled to full freedom not to join or adhere to the Affiliates, these threats of discharge in order to compel membership in the Affiliates and to forestall the United constituted assistance to the Affiliates and coercion of the employees. *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518, 520; *International Association of Machinists* v. *Na-*

tional Labor Relations Board, 311 U. S. 72, 76–77; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 270; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.,* 303 U. S. 272, 274; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U. S. 58, 75.

(b) On March 18 the Company discharged Ramsey because he refused to join the Affiliates, although Ramsey, as an old employee, was under no obligation to join (*supra,* p. 17). Ramsey's discharge was, of course, direct interference with the rights of self-organization, and constituted unlawful assistance to the Affiliates. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 183; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 598, 601; *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 77.

(c) For two weeks, from March 22 to April 5, the Company shut down its plant and locked out its employees for the admitted purpose of enabling the Affiliates to cement their ranks and prevent defections to the United (*supra,* p. 18). This lock-out constituted interference with, coercion, and restraint of all employees, old as well as new, and assistance to the Affiliates of the strongest kind.[17]

[17] The shutting down of a plant to deter employees from joining a union which the employer opposes, or, conversely,

(d) On April 3 and 4, 1937, the Company published notices addressed to the employees misrepresenting the July 1936 agreements as full closed-shop agreements requiring all employees, old and new, to be members of the Affiliates as a condition of employment (*supra*, pp. 18–19). Since the July 1936 agreements in fact contained no membership requirement as to old employees, the notices were an obvious interference with the right of old employees to select representatives of their own choosing.

The Board correctly found that in these ways the Company interfered with, restrained, and coerced its employees contrary to Section 8 (1) and assisted the Affiliates prior to entering into the full closed-shop agreement of April 3, 1937.

The Affiliates, however, urged in the court below that the Company's acts of assistance during March and April 1937, if otherwise unlawful, were

---

to induce employees to affiliate with a union which the employer favors, is a uniformly recognized violation of the Act. E. g. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, affirming 91 F. (2d) 790, 792 (C. C. A. 9); *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 688–689 (C. C. A. 1); *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97, 100 (C. C. A. 2); *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 477–478 (C. C. A. 3), modified in another respect, 311 U. S. 7; *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815, 818 (C. C. A. 8); *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 657 (C. C. A. 9).

in this case valid because they were requested by and given to the exclusive bargaining representative under the then existing collective agreements of 1936.[18] Their contention goes much beyond the proposition, with which we agree, that if the conditions set forth in the proviso to Section 8 (3) are satisfied, an employer and a labor union may validly enter into a full closed-shop contract requiring membership in the union on the part of all employees, or into a partially closed-shop contract requiring membership in the union on the part of a portion of the employees; in such case the employer may normally enforce the terms of the contract by discharging those employees who fail to fulfill the contract's requirement that they become or remain members of the union. The Affiliates' contention, however, is that even when the collective agreement contains no requirement of union membership as to any of the employees (or requires union membership only as to a portion of the employees), the employer is entitled to assist the bargaining representative by com-

[18] Brief for the Affiliates in the court below, No. 8748, October Term, 1940, pp. 36-42. The contention was formulated by the Affiliates as follows (p. 36):

"* * * Would not the acts of 'assistance' in the present case, done by the Company at the request of the duly authorized, exclusive bargaining agent of its employees under a valid existing contract, be perfectly legal even though the contract contained no requirement whatsoever as to membership of employees but merely recognized the Union as exclusive agent for a year period? * * *"

pelling employees *not* required by the contract to be union members nevertheless to join the union under penalty of discharge. This contention finds no support in the statute, its legislative history, or in the applicable decisions.

Section 8 (1) of the Act unqualifiedly forbids an employer "to interfere with, restrain, or coerce employees in the exercise of the rights" guaranteed by Section 7. Section 8 (3) broadly proscribes employer discrimination "to encourage * * * membership in *any* labor organization" [italics added], without excepting a labor organization which is the exclusive bargaining representative under an existing collective agreement. The single exception set forth in the proviso to Section 8 (3), is that an employer is permitted to make "an agreement" with an unassisted labor organization which is the majority representative to require membership therein as a condition of employment. Except, however, in the single situation where the employer may thus discriminate pursuant to the terms of a valid closed-shop agreement, the provisions of the Act forbid employer pressure on employees to adhere to a particular labor organization. As the Court held in *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 81:

> By § 8 (3) of the Act discrimination upon the basis of union membership constitutes an unfair labor practice unless made because of a valid closed-shop contract.

Could any doubt remain, it is dispelled by the legislative history of the Act. The Senate Committee report makes clear that only through a closed-shop agreement may an employer force his employees to join a labor organization, even when that organization is the representative of a majority of the employees. The report states, (S. Rep. No. 573, 74th Cong., 1st Sess., p. 13):

> Majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all. *But majority rule, it must be noted, does not imply that any employee can be required to join a union, except through the traditional method of a closed-shop agreement, made with the assent of the employer.* * * * *in the absence of such an agreement the bill specifically prevents discrimination against anyone* * * * *for not belonging to a union* * * *. [Italics added.]

The court below while not adverting to the broadest argument suggested by the Affiliates, that coercion otherwise unlawful may validly be exercised to aid the representative under an exclusive collective-bargaining agreement containing no closed-shop provisions whatever, adopted a varia-

tion of it by holding that coercion otherwise unlawful might validly be exercised by the Company *against all employees* to aid the Affiliates as representative under an exclusive collective-bargaining agreement containing closed-shop provisions as to *only a portion of the employees,* in this case the new employees.[19]

The reasoning of the court below on this issue must fail in two respects. First, as we indicate hereafter (*infra,* pp. 46–50), the secret character, and failure to inform the employees, of the oral agreement which contained the partial closed-shop provisions, sapped the agreement of any power it otherwise might have conferred to justify coercion and discrimination even against the new employees covered thereby, let alone old employees. Second, even if it be assumed that the oral agreement was publicly made and announced and hence wholly valid as to the new employees, there is no basis for the view that it extends power to the employer to coerce old employees *not* covered by the compulsory membership requirement. The court's rationale (R. 872, 874–875) apparently was that because the Company had entered into a partial

[19] While its rationale is not entirely clear, the court below may also have based its conclusion that the Company's assistance was not illegal on the view that old employees were obliged to remain members of the Affiliates and that, therefore, the Company was entitled to coerce them. We discuss the error of this view below, pp. 39–44. In any event, however, such a view could not justify coercion of old employees who had never been members of the Affiliates.

closed-shop contract protected (*pro tanto*) by the proviso to Section 8 (3), (*infra*, p. 30), it obtained from the proviso the absolute right to "prevent the entrance of a rival union into its plant," and to that end could use coercive measures against every employee in the plant. But this approach basically misconceives the proviso to Section 8 (3) as a grant of authority to an employer to engage in whatever unfair labor practices he deems expedient in order to maintain the existing bargaining representative. There is nothing in the proviso or in its legislative history which suggests that it was enacted to protect the employer from dealing with a new union, or that it confers upon an employer rights of coercion other than the right to deny employment to those persons, and only those persons, who fail to observe the terms of a valid closed-shop contract. The legislative history of the Act (*supra*, p. 26; *infra*, pp. 33–34) makes clear that the proviso does not confer broad rights on employers to engage in a variety of undefined conduct which would otherwise constitute unfair labor practices in order to prevent employees from exercising their rights of self-organization by choosing a different bargaining representative. Rather the proviso is but an exception under carefully controlled conditions to the prohibition of discrimination in Section 8 (3).[20]

The decision of the court below cannot be reconciled with *National Labor Relations Board* v.

[20] See S. Rep. No. 573, 74th Cong., 1st Sess., p. 12.

Waterman Steamship Corp., 309 U. S. 206. In the *Waterman* case, the Company had entered into a collective agreement with the I. S. U. giving "preference of employment" to members of the I. S. U. as "vacancies occur" (at p. 211). To that extent the contract was within the proviso to Section 8 (3). But this Court held that the employer violated the Act when it engaged in discrimination in favor of the I. S. U. by discharging members of the N. M. U. in a situation where vacancies had not occurred. In so holding, the Court necessarily rejected the interpretation of the proviso adopted by the court below. For if, as the court below held, discrimination beyond the restraint inherent in the terms of a proviso contract is lawful to prevent the entrance of a rival union, then the employer in the *Waterman* case should have been absolved of the charges of violating Section 8 (3) of the Act. See also *South Atlantic Steamship Co.* v. *National Labor Relations Board*, 116 F. (2d) 480 (C. C. A. 5), certiorari denied, 313 U. S. 582.

2. *The subsequent closed-shop contract with the Affiliates of April 3, 1937, reduced to writing on May 20, 1937, was therefore invalid under Section 8 (3) of the Act since made with a union assisted by the Company's unfair labor practices*

Under Section 8 (3) of the Act a closed-shop contract, which *ipso facto* requires discrimination

upon the basis of union membership, is invalid except when the conditions enumerated in the proviso to the section are satisfied. The proviso is as follows:

> * * * *Provided,* That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

The express language of the proviso plainly establishes as an essential prerequisite to the making of a valid closed-shop agreement the condition that the contracting labor organization shall not have been "established, maintained, or assisted by any action defined in this Act as an unfair labor practice." [21] This condition the closed-shop agreement here in controversy did not meet. Prior to its execution by the Company and the Affiliates on

[21] The Senate Committee on Education and Labor pointed out concerning this provision: "* * * the bill is extremely careful to forestall the making of closed-shop agreements with organizations that have been 'established, maintained, or assisted' by any action defined in the bill as an unfair labor practice." S. Rep. No. 573, 74th Cong., 1st Sess., p. 12.

April 3, 1937, and its reduction to writing on May 20, 1937, the Affiliates had been assisted by unfair labor practices committed by the Company and designed to discourage membership in the United and to coerce the employees to join the Affiliates (*supra*, pp. 17–19, 21–29). The Board, therefore, properly found (R. 194–196, 202, 206–207) that the closed-shop contract was invalid since an essential condition, the absence of employer assistance, was lacking.

The Affiliates, however, contend (Br. in Opp., pp. 9–10) that the closed-shop contract was protected by the proviso to Section 8 (3) of the Act despite employer assistance rendered to the Affiliates prior to the making of the contract. The contention is bottomed on the argument that the proviso invalidates a closed-shop contract only if the union's *majority* is secured or maintained by means of unfair labor practices, and that, therefore, any coercion falling short of effecting the adherence of a majority of the employees is immaterial to the validity of the contract. This contention was rejected by the Board (R. 195–196),[22] and was not passed upon by the lower court, although urged by the Affiliates.

The Affiliates' construction of the proviso runs counter both to its language and to its legislative

[22] The Board accordingly found it unnecessary to determine whether the Affiliates' majority on April 3, 1937, had been retained as a result of the unfair labor practices (R. 195).

history, and was rejected by this Court, at least
implication, in *International Association of M*
chinists v. *National Labor Relations Board,* 3
U. S. 72.

The language of the proviso negatives the vie
advanced by the Affiliates. The "assistance
clause expressly proscribes closed-shop contrac
with a labor organization assisted by "any action
constituting unfair labor practices under the Ac
there is no suggestion that the only assistan
which invalidates the closed-shop contract must
that which establishes or retains majority statu
In view of the plain and unambiguous words
the proviso, "no room is left for construction.
Lake County v. *Rollins,* 130 U. S. 662, 670–67
Yerke v. *United States,* 173 U. S. 439, 442.

Moreover, to adopt the Affiliates' interpret
tion would be to indulge the assumption that Co
gress was performing an idle act in enacting th
"assistance" clause. For were the clause delete
the remainder of the proviso would bar closed-sho
contracts with labor organizations whose majorit
status is attributable to employer coercion. Th
proviso permits such a contract to be made onl
with a labor organization which is "the repr
sentative of the employees as provided in sectio
9 (a) * * *," i.e., which has been "designated
selected for the purposes of collective bargainin
by the majority of the employees * * *
(Section 9 (a)). It is obvious that the "majority
which Congress referred to in Section 9 (a) is

freely chosen majority, not one attributable to employer coercion. Cf. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461–462; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 340; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82; *National Labor Relations Board* v. *P. Lorillard Co.*, No. 71, this Term, decided January 5, 1942. If the "assistance" clause in the proviso were limited to bar closed-shop contracts only with an assisted "majority," it simply reiterates, and adds nothing to, the further requirement that the union be representative of the employees as provided in Section 9 (a).

The legislative history similarly forecloses the Affiliates' position. The report of the Senate Committee on Education and Labor states (S. Rep. No. 573, 74th Cong., 1st Sess., p. 12):

> * * * the proviso in two respects actually narrows the now existent law regarding closed-shop agreements. While today an employer may negotiate such an agreement even with a minority union, the bill provides that an employer shall be allowed to make a closed-shop contract only with a labor organization that represents the majority of employees in the appropriate collective-bargaining unit covered by such agreement when made.
>
> Secondly, the bill is extremely careful to forestall the making of closed-shop agreements with organizations that have been

"established, maintained, or assisted" b any action defined in the bill as an unfai labor practice. And of course it is clea that no agreement heretofore made coul give validity to the practices herein pro hibited by section 8.

The Senate Report thus makes clear that in tw respects the law relating to closed-shop agree ments is narrowed: (1) the contracting labo organization must be the majority repre sentative; and (2) the organization must not b established, maintained, or assisted by unfair labo practices. To like effect is the report of the Hous Committee on Labor.[23]

For Congress to have enacted the proviso in th form for which the Affiliates now contend woul have rendered administration of the proviso sub stantially unworkable and would have immunize

---

[23] The Report reads as follows (H. Rep. No. 1147, 74t Cong., 1st Sess., p. 19):

"* * * The proviso does not impose a closed shop o all industry; it does not give new legal sanctions to th closed shop. All that it does is to eliminate the doubt and misconstructions in regard to the effect of section 7 (a upon closed-shop agreements, and the possible repetition o such doubts and misconstructions under this bill, by pro viding that nothing in the bill or in section 7 (a) or i any other statute of the United States shall illegalize closed-shop agreement between an employer and a labo organization, provided such organization has not bee established, maintained, or assisted by any action define in the bill as an unfair labor practice and is the choic of a majority of the employees, as provided in section 9 (a) in the appropriate collective bargaining unit covered b the agreement when made * * *."

unfair labor practices otherwise prohibited. For normally there is no feasible means of ascertaining how many employees, whether more or less than a majority, have been influenced by unfair labor practices to become or remain members of a favored labor organization. In the case at bar, for example, it is a matter of speculation whether, had the Company refrained from unlawfully assisting the Affiliates, a majority of the employees might not have repudiated the Affiliates and joined the United prior to April 3, 1937, thus debarring the Affiliates from entering into the closed-shop contract on that day. No accurate determination is possible by calling each employee to testify whether the unfair labor practices influenced him to adhere to the Affiliates; such testimony is notoriously unreliable. Cf. *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. (2d) 930, 937 (C. C. A. 1); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 653 (App. D. C.). As this Court held in *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588, "It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice."

Underlying these decisions is the recognition of the impossibility of measuring with any degree of exactness the subjective response to employer unfair labor practices, or the precise number of em-

ployees whose will has been coerced. Congress accordingly concluded that it was better to prohibit closed-shop contracts with assisted labor organizations without regard to whether a majority were influenced thereby, than to condition the validity of such agreements on a fruitless and unscientific inquiry into the psychological reaction of each employee exposed to unfair labor practices.[24]

Further, the decision of this Court in *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, is decisive of the issue here. There the Machinists union contended that even though the employer's assistance may have contributed to the obtaining of a majority, a subsequent closed-shop contract could not be abrogated in the absence of proof and findings that the

[24] To support their construction, the Affiliates have suggested hypothetical situations in which the unfair labor practices will affect only one employee out of a thousand; or in which the assistance may consist merely of "a word of praise" by a straw boss; or in which the assistance may be "unsolicited, unwanted, or even unknown to the recipient organization." (Brief for the Affiliates in the court below, No. 8748, October Term, 1940, pp. 12, 17.) The answer to this argument is the one given by this Court in comparable circumstances in *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 467, that "what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases." The unfair labor practices in the present case were neither slight, nor unwanted, nor unknown. On the contrary, the assistance was part of a broad plan to coerce membership in a favored labor organization and to forestall adherence to a rival.

employer's assistance served to maintain that majority until the time the contract was made (p. 79). The Court's primary answer (*ibid.*), that it was sufficient that during the interim period unfair labor practices continued to exist which deprived the employees of free choice, at least by implication rejected (since it did not require a showing that a majority had in fact been influenced to remain by the unfair labor practices) the argument that the proviso relates only to assistance which secures or retains the majority. Also, at another point in the opinion, the Court after reciting the grounds upon which the Board had held the closed-shop contract to be illegal, including the ground of employer-assistance to the contracting union, stated (p. 75):

> We think there was substantial evidence that petitioner had been assisted by unfair labor practices of the employer and that therefore the Board was justified in refusing to give effect to its closed-shop contract.[25]

---

[25] See also *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 987 (C. C. A. 7), certiorari denied, 311 U. S. 662; *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 34 (App. D. C.), affirmed 311 U. S. 72; *Warehousemen's Union* v. *National Labor Relations Board*, 121 F. (2d) 84, 87 (App. D. C.), certiorari denied, No. 627, this Term. These cases all recognize that majority status and absence of assistance are independent conditions precedent to the validity of a closed-shop agreement. There are no decisions to the contrary.

In sum, we submit that the Affiliates' interpretation of the proviso is refuted by the plain language of the statute, its legislative history, and the decisions which have construed the proviso, and that, accordingly, the Board was correct in its conclusion that the closed-shop contract of April 3, 1937, reduced to writing on May 20, 1937, was invalid.

3. *The refusal to reinstate 24 employees was therefore discriminatory in violation of Section 8 (3) and (1) of the Act since the closed-shop contract was invalid*

The Company after entering into the closed-shop contract on April 3, 1937, restricted reinstatement pursuant to that contract to employees who presented clearance cards from the Affiliates. As a result the Company excluded from reinstatement 24 adherents of the United, who were either unable to obtain clearance cards or did not obtain them in time (*supra*, p. 19). The Board found that the Company thereby discriminated against the 24 employees, 19 of whom were old and five of whom were new,[30] in violation of Section 8 (3) and (1) of the Act (R. 197–200, 208, 211). We consider the propriety of the finding separately with respect to the 19 old and the five new employees.

(a) *The old employees.*—The Company's denial of reinstatement to the old employees through im-

[30] We use the terms "old" and "new" employees in the same sense as before (*supra*, p. 5, note 3).

position of the clearance-card condition unquestionably violated Section 8 (3) and (1) of the Act. The sole basis on which the Company imposed the condition, which was in substance a requirement of membership in the Affiliates (R. 197, n. 44), was the invalid closed-shop contract of April 3, 1937. It is settled that the conditioning of employment upon affiliation with a labor organization is "a violation of § 8 (3) of the Act in absence of a valid closed-shop agreement, not present here." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 601; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 81.

The court below, however, apart from its other holdings which we have already discussed (*supra*, pp. 26–29), additionally rejected the Board's finding that the old employees had been discriminatorily refused reemployment. This it did on the ground that the old employees who had been members of the Affiliates[27] were obligated to remain members.[28]

The court reached this result by declaring that it was "an implied term" of the July 1936 col-

---

[27] The court's theory, it should be noted, is thus inapplicable to three of the 19 old employees, since three had never joined the Affiliates at all (*supra*, p. 19). The court incorrectly stated (R. 873) that 18 of the old employees found by the Board to have been discriminated against had been members of the Affiliates.

[28] Employees had signed cards, upon joining the Affiliates, providing that the signer designated the appropriate Affil-

lective agreements that all members of the Affiliates "would cooperate in the enforcement" thereof (R. 871); that this bound all members "to be in good union standing in order to continue in respondent's employ" (R. 873); and that they "violated the [1936 collective] contract[s] when they tried to bring in a rival union, and became rightfully subject to discharge" (R. 873).

There is no basis for the court's finding of an implicit undertaking in the collective agreements binding members of the Affiliates to retain membership therein and not join a rival union under penalty of discharge. Certainly the express terms of the agreements, as the Board found upon substantial evidence (*supra*, pp. 14–16) and as the court did not question, contained no compulsory membership requirements except as to *new* employees and "placed no limitation" on the right of old employees "to drop their membership in the" Affiliates (R. 178). Hence the court below apparently viewed as inherent in *any* collective agreement an undertaking binding all members

---

iate as bargaining representative, and further providing (R. 188; R. 865):

"I also authorize the Company to deduct, within thirty days, from wages due, the prevailing initiation or reinstatement fee of the organization as indicated hereon and transmit same to the authorized representative of the organization.

"The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me,

of the contracting union to retain membership and refrain from joining a rival.

That view, we submit, cannot be sustained. To hold that the mere making of a collective contract which contains no requirement that employees maintain membership in the contracting union subjects a member to discharge if he surrenders his membership or joins a rival union is entirely to disregard the provisions of the Act and the legislative history above reviewed (*supra*, pp. 26, 33–34). It is clear therefrom that an obligation to maintain membership can arise only through a collective contract so providing. See S. Rep. No. 573, 74th Cong., 1st Sess., p. 13; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 20, 21. When the collective agreement includes no closed-shop provisions, or, as here, includes only a closed-shop provision limited to new employees, it is clear that the agreement cannot be read as also imposing closed-shop conditions on old employees who are members of the contracting union.[29]

---

and shall remain in full force and effect for one year from date and thereafter, subject to thirty (30) days written notice of my desire to withdraw such power and authority to act for me in the matters referred to herein."

[29] It may, of course, be that in the *membership* agreement made between the union and its members, the members may assume obligations *to the union* to remain a member of the union for a specified period. Breach of this membership agreement, however, while possibly subjecting the members to damages or other common-law liabilities to the *union*, is

Adoption of the rule advanced by the cou below would gravely limit the employees' freedo to choose their representatives. Once a collecti contract were made, the choice of bargaining re resentatives would, for practical purposes, becom irrevocable, since the employer could rightfull discharge any employee who chose another re resentative or even advocated such a change i representation during the life of the collecti contract.[39] This is contrary to the stated purpos of the Act which guarantees to employees the rig

---

not, for the reasons already stated, a breach of the *collecti* agreement between the employer and the union and does n subject the employees to discharge unless the collective agre ment so provides. In the instant case, for instance, the ol employees who had designated the Affiliates as their ba gaining agent were required by the terms of their membe ship and designation agreement with the Affiliates to giv 30 days' written notice in order to terminate such designatio (*supra*, p. 39, n. 28). In withdrawing from the Affiliates i may be that they violated the agreement with the Affiliates i their failure to give notice. But this does not mean that thei failure to notify the Affiliates constituted a violation of th July 1936 collective agreements between the Company an the Affiliates which contained no closed-shop provision applicable to them.

[39] While we have discussed the undertaking which th court below implied as one to maintain membership, it scope is even broader than that; the court stated tha members of the Affiliates who "tried to bring in a riva union" (R. 873) became subject to discharge, and that the violated the "implied term" when they took action "look ing toward" a change (R. 871). Apparently mere ad vocacy of a change in affiliation would thus be ground fo dismissal.

to bargain collectively through representatives "of their own choosing" (Section 7).

Here the movement to initiate the United began in March 1937, only about three months before the collective agreements of July 1936 were to expire. Under the view of the court below, members of the Affiliates who advocated affiliation with the United immediately subjected themselves to discharge. The practical result of this rule is to make impossible the selection of any bargaining representative other than the Affiliates upon the expiration of the 1936 collective agreements. Another bargaining agent could not normally hope to be selected unless it conducted an organizing campaign. Such campaigns cannot be carried on exclusively by outside organizers. The latter must be assisted by employees within the plant who are able to appeal to their fellow employees on grounds of mutual interest. Under the view of the court below, such activities on behalf of any organization other than the Affiliates are prohibited while the collective contracts are in effect. The result is that the Affiliates, as the sole candidate for employee choice able to conduct an effective campaign, would still be the choice of a majority of the employees when the 1936 collective agreements expired, would immediately enter into another collective agreement—in this case it did so even in advance of the expiration of the 1936 agreements by entering into the April 3,

1937, and May 20, 1937, collective agreement (*supra*, p. 19)—and would thus perpetuate indefinitely the Affiliates' status as bargaining representative.

This could not have been the intent of Congress. Just as in political elections the voters are permitted, before the term of the existing officeholder expires, to campaign for any candidate for the next term, so in selection of a bargaining agent, the employees must be able, before the term of existing representative has come to an end, to campaign for any union for the next period. At least in situations such as are here presented,[21] the freedom and the rights of labor require, particularly as the life of the collective contract draws to a close, that the employees be able to advocate a change in their affiliation without fear of discharge by an employer for so doing.

(b) *The new employees.*—The case of the five new employees differs from that of the old employees only in that the secret oral agreement of 1933 between the Company and the Affiliates, renewed in July 1936, required new employees to join the Affiliates as a condition of employment (*supra*, pp.

[21] What would be the employee's rights to advocate membership in, or to join, a rival union, toward the termination date of a full *closed-shop* contract, and whether the employer would be justified in such a situation in discharging the employee, are not here involved. Whatever may be the restrictions under such facts, here there was no closed-shop contract covering the employees against whom discrimination is now sought to be justified.

12–13). The Board properly rejected (R. 199–200, 179) the contention that, even if the imposition of the clearance-card condition against the new employees was illegal under the invalid closed-shop contract of April 3, 1937, it was nevertheless permissible under the oral agreement.

The Board's conclusion in this respect rests on two independent grounds: (1) that the oral agreement was abandoned by the parties at the time the invalid closed-shop contract of April 3, 1937, was made (R. 193–194, 199); and (2) that even if the oral agreement had not been abandoned, its secret character and the Company's failure to inform the employees of its existence (*supra*, pp 13–14) deprived the Company of the right to insist that its new employees join the Affiliates.

(1) The first ground involves a determination of fact. As to this, upon the substantial evidence above cited (*supra*, p 19),[32] the Board found (R. 193–194):

> In substance, though not in form, the arrangement effected between the respondent and the A. F. of L. Affiliates on or about April 3, 1937, was an abandonment

[32] The record is barren of evidence that the Company, at the time of reopening the plant, even purported to rely on the actual oral agreement of 1936 as the basis for refusing to reinstate the new employees. Instead, as we have noted (*supra*, pp. 18–19), the Company in its newspaper advertisements announced a fictitious 1936 closed-shop agreement which in fact had been made during the shut-down.

> of the oral agreement as insufficient to meet the exigencies of the situation and its replacement by a closed-shop agreement
> * * *

It should be added that the abandonment of the oral agreement and the substitution therefor of the closed-shop contract was conceded by the Affiliates at the oral argument before the Board (R. 193-194, Tr. Oral Argt., p. 12).[33] Clearly, therefore, the oral agreement, since it had been abandoned, could not justify the discrimination which occurred thereafter.

(2) Even if the oral agreement had not been abandoned, its secret character and the Company's failure to inform the employees of its existence would, as the Board held, forbid reliance upon the agreement as justifying imposition by the employer of the penalty of deprivation of employment because of nonmembership in the Affiliates. The Board stated the reason for its conclusion as follows (R. 179):

> * * * the proviso [to Sec. 8 (3)] does not permit imposition of the penalty in a case where no notice has been given of the existence of the agreement. The proviso in permitting the employer "to require membership" in a labor organization manifestly implies that the employee shall be advised that the employer's action is taken pursuant to an agreement. Otherwise em-

[33] A copy of the transcript of the oral argument before the Board is on file with the Clerk of this Court.

ployees would have no means of knowing whether they were being illegally discriminated against, or whether the employer was simply enforcing a valid obligation. The proviso was hardly intended to permit equivocal employer conduct, so likely to precipitate industrial conflict over what employees, in view of the employer's silence, quite reasonably would conclude was an interference with rights guaranteed to them by Section 7 of the Act.

The Board's interpretation of the proviso is a reasonable one and clearly furthers the purpose of Section 8 (3) to protect employees against improper discharge, a possibility inherent in an employer's concealment of an agreement which requires membership in a union as a condition of employment. A contrary holding would seriously endanger exercise by employees of the rights to self-organization guaranteed in Section 7: an employee who sought to further a union not favored by the employer might suddenly, without prior warning, find that he had been discharged upon the claim that the employer had entered into a secret contract with the favored union requiring the employee's membership in the latter organization. The possibilities of fraud and coercion and the restrictive effects upon employee self-organization inherent in such a situation are manifold and obvious.[14] The employer would be free to keep the

[14] The mere possibility of an unknown secret agreement deprives an employee of full freedom of self-organization: If he should choose to join or campaign for a union other

weapon in reserve, using it only when and as he saw fit for his own convenience. The confusion and collusive manipulation to which such a secret agreement gives rise is vividly demonstrated by the very sequence of events here in controversy.

It is, therefore, reasonable to insist that an employer, before being permitted to enforce a compulsory membership requirement, should provide the employees, either orally or in writing, with "an authentic record of its terms" as evidence "of the good faith of the employer." Cf. *H. J. Heinz Co. v. National Labor Relations Board,* 311 U. S. 514, 524. Only in that way do the employees receive adequate protection; at the same time the employer who enters into a compulsory membership contract in good faith and apprises the employees of its existence will be given the full immunity which the proviso to Section 8 (3) was intended to confer.

---

than the one holding an exclusive bargaining contract in the plant, he would do so at his peril. If, without warning, he can be discharged for such activity, he would be reluctant to take the risk at all.

In other ways, too a secret agreement restricts an employee of his freedom and contravenes the policy of the Act. Whether or not one seeking to be hired is then subject to a union membership requirement might well be a factor in an applicant's decision to take employment. Further, once he is employed, the employee's course of conduct might in other respects be charted by the presence or absence of a membership requirement. If the requirement is made known to him, and he takes the employment, he will, of course, join the union and have a voice in its affairs. If, on the other hand, he is not aware of the requirement, he is subject to all its restrictions at any time which the employer may choose,

The court below (R. 873–874), however, held that notice may be imputed to the employees because the Affiliates were aware of the oral agreement they had made and, since they were the majority and hence exclusive representative of all the employees in the plant, the latter, as principals, were chargeable with the knowledge of their representative. The short answer to this view is that here the Company deliberately withheld general notice of the agreement.[25] But in any event, narrow common-law concepts of principal and agent do not furnish a proper basis for limiting the protection of employees under the Act. Strict application of agency principles is no more permissible in this situation than was "strict application of the rules of *respondeat superior*" in *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80. "We are dealing here not with private rights * * * nor with technical concepts * * * but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence" (*ibid.*). Whatever the rules of imputed knowledge at common law may be, it is reasonable to construe the proviso to Section 8 (3), as the Board did, to

---

without at the same time having a share in that shaping of his employment destiny and union policy which joining the union would bring him. In effect, therefore, he is lulled into disenfranchising himself. Clearly, these are results not consonant with principles of fairness to the employee.

[25] See President Tuteur's letter, *supra*, p. 14.

mean that the employer must give actual notice to his employees of a compulsory membership contract before he may rely on the proviso to justify discrimination on the basis of union membership. Since the Company failed to give such notice, the discrimination may not be validated on the basis of the oral agreement.

The court below, therefore, erred in rejecting the Board's finding that the five new employees, as well as the 19 old employees, were refused reinstatement discriminatorily in violation of Section 8 (3) and (1) of the Act.

CONCLUSION

It is respectfully submitted that the decree of the court below should be reversed, and the cause remanded with directions to enforce the Board's order in full, except for its work-relief provisions.

CHARLES FAHY,
Solicitor General.

RICHARD S. SALANT,
Attorney.

ROBERT B. WATTS,
General Counsel,

ERNEST A. GROSS,
Associate General Counsel,

MORRIS P. GLUSHIEN,
ROMAN BECK,
Attorneys,
National Labor Relations Board.

JANUARY 1942.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151 *et seq.*) are as follows:

> SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SECTION 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an em-

ployer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * *

SECTION 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1943